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[redacted] JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 19 1956
Joseph W. Stewart
CLERK

No. 13,017

MARGUERITE JAMIESON, ET AL.

Appellants

v.

WOODWARD & LOTHROP, ET AL.

Appellees

Appeal From The United States District Court
For The District of Columbia

Benjamin H. Dorsey
Irving G. McCann
1025 Connecticut Avenue
Washington 6, D. C.
Attorneys for Appellants

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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JOINT APPENDIX

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

14 [Filed May 23, 1955]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGUERITE JAMIESON
and
CECIL B. JAMIESON
432 Leesburg Pike
Falls Church, Virginia

Plaintiffs

Civil Action No. 2268-'55

vs.

WOODWARD & LOTHROP,
a corporation,
1021 F Street, N. W.
Washington, D. C.
and
HELENA RUBINSTEIN, INC.,
a corporation,
1752 M Street, N. W.
Washington, D. C.

Defendants

COMPLAINT

(Negligence - Money Damages)

1. This is an action to recover in excess of $3,000.00 exclusive of interest and costs for each and every plaintiff. Jurisdiction is invoked under the provisions of 28 USC Sec. 1332.

2. Plaintiffs are citizens of the United States and residents of the State of Virginia. Defendant, Woodward & Lothrop, is a corporation organized and existing under the laws of the District of Columbia. Defendant, Helena Rubinstein, Inc., is a foreign corporation doing business in the District of Columbia.

3. On February 9, 1955 plaintiff Marguerite Jamieson purchased an elastic rubber rope from defendant Woodward & Lothrop which rope was advertised and sold as an exercising and reducing device under the tradename "Lithe-Line" by defendant Helena Rubinstein, Inc. Such device

consists of a solid rubber rope, approximately 40 inches long, with a loop as a hand grip at either end. Instructions for the use of the "Lithe-Line" published by defendant Helena Rubinstein, Inc. accompanied the device in its container.

4. On February 11, 1955 plaintiff Marguerite Jamieson undertook to use the "Lithe-Line" device in accordance with the instructions provided. As a result of her attempted use of such device in accordance with the instructions provided, plaintiff Marguerite Jamieson was struck across the eyes by said device and suffered a permanent partial loss of vision in her left eye by reason of a detached retina which has caused, is causing, and will continue to cause great pain and suffering and anguish of mind and body; and as a further result of said injury plaintiff Marguerite Jamieson has incurred medical and other expenses of approximately $1,000.00.

5. Such device when used according to the instructions provided for the purpose for which it was advertised and sold, is inherently dangerous to the user, and failure of defendants to warn or otherwise protect plaintiff Marguerite Jamieson against such danger constituted negligence and breach of warranty of fitness.

6. As a further result of defendants' negligence and breach of warranty of fitness plaintiff Cecil B. Jamieson has suffered from the deprivation of the consortium of his wife Marguerite Jamieson.

WHEREFORE,

1. Plaintiff Marguerite Jamieson demands judgment against defendants and each of them in the amount of $50,000.00 and costs.

2. Plaintiff Cecil B. Jamieson demands judgment against defendants and each of them in the amount of $5,000.00.

3. Plaintiffs demand a jury trial.

(Signed) Marguerite Jamieson, Plaintiff

(Signed) Cecil B. Jamieson, Plaintiff

(Signed) Irving G. McCann
(Signed) Benjamin H. Dorsey
Attorneys for Plaintiffs
1025 Conn. Ave. N.W.

[Filed June 7, 1955]

16 ANSWER AND CROSS-CLAIM OF DEFENDANT WOODWARD & LOTHROP

First Defense

The complaint fails to state a claim upon which relief can be granted against the defendant Woodward & Lothrop.

Second Defense

The defendant Woodward & Lothrop admits that it is a corporation organized and existing under the laws of the District of Columbia. This defendant has no knowledge as to the alleged February 9, 1955 purchase by and injury to the plaintiff Marguerite Jamieson set forth in paragraphs 3 and 4 of the complaint. Defendant has no knowledge nor information sufficient to form a belief as to the truth of damages claimed in the complaint. The allegations of paragraph 5 of the complaint are conclusions of the pleader which this defendant need not answer. The remaining allegations of the complaint, insofar as they refer to this defendant, are denied.

Third Defense

The injury allegedly sustained by the plaintiff, Marguerite Jamieson, was caused by her own negligence and lack of due care for her own safety.

17 Fourth Defense

The elastic rubber rope which allegedly caused the female plaintiff's injury was open and available to inspection and the plaintiff assumed any risk incident to its use.

Fifth Defense

There was no warranty from this defendant of the trade name device "Lithe-Line".

CROSS-CLAIM

AGAINST DEFENDANT HELENA RUBINSTEIN, INC.

The defendant, Woodward & Lothrop, avers that if it is held liable for damages to the plaintiffs, then its vendor, the defendant Helena Rubinstein, Inc., as the party primarily liable, is responsible over to this defendant.

WHEREFORE, the defendant, Woodward & Lothrop, demands of the defendant, Helena Rubinstein, Inc., exoneration of the full sum awarded against it in favor of the plaintiffs, or a contributable portion thereof.

HOGAN & HARTSON

By George D. Horning, Jr.
Frank F. Roberson
810 Colorado Building
Washington 5, D. C.
Attorneys for Defendant,
Woodward & Lothrop

Certificate of Service

A copy of the foregoing Answer and Cross-Claim of Defendant Woodward & Lothrop was mailed this 7th day of June, 1955, to Irving G. McCann, Esq. and Benjamin Dorsey, Esq., attorneys for plaintiffs, 1025 Connecticut Avenue, N.W., Washington, D.C. and Helena Rubinstein, Inc., 1752 M Street, N.W., Washington, D. C.

HOGAN & HARTSON

By Frank F. Roberson
Attorneys for Defendant,
Woodward & Lothrop.

[Filed June 20, 1955]

18 ANSWER OF DEFENDANT, HELENA RUBINSTEIN, INC., A CORPORATION, TO COMPLAINT

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted against this defendant.

SECOND DEFENSE

The above named defendant admits that this action is in excess of $3,000.00, and that it is doing business in the District of Columbia; it

is without information or belief sufficient to either admit or deny the allegations with respect to the citizenship or residences of the plaintiffs, or as to the corporate status of the co-defendant; and it is without information or belief sufficient to either admit or deny the allegations set out in paragraph three of the complaint; it is without information or belief sufficient to either admit or deny the allegations contained in paragraph four of the complaint; it denies each and every allegation contained in paragraphs five and six of the complaint; it denies each and every other allegation contained in the complaint.

19

GALIHER & STEWART

By Richard W. Galiher
Attorneys for Defendant
above named.
820 Woodward Bldg.,

Copy of the foregoing Answer to Complaint was this 14th day of June, 1955. mailed, postage prepaid, to Irving G. McCarn and Benjamin H. Dorsey, Esqs., Attorneys for Plaintiffs, 1025 Conn. Ave., N.W., Washington, D. C., and to Hogan and Hartson, Colorado Building, Wash. D. C., Attorneys for co-defendant.

GALIHER & STEWART

By Richard W. Galiher
Attorneys for Defendant
above named
820 Woodward Bldg.

[Filed Aug. 12, 1955]

20 INTERROGATORY

State in what manner the "Lithe-Line" device which was allegedly being used by the female plaintiff at the time of her accident is inherently dangerous, as set out in paragraph Five of the complaint.

GALIHER & STEWART

By Richard W. Caliher
Attorneys for Defendants

Copy of the foregoing Interrogatory mailed this 12th day of August, 1955, to Irving G. McCann, and Benjamin H. Dorsey, Esq., Attorneys for the Plaintiff, 1025 Conn. Ave., N.W., Washington, D. C.

GALIHER & STEWART

By Richard W. Galiher

[Filed Aug. 31, 1955]

21 ANSWER TO INTERROGATORY

The "Lithe-Line" device used by the female plaintiff and which caused her injury is inherently dangerous because:

(1) The "Lithe-Line" device, a solid rubber rope approximately 40 inches long, when used for the exercise described by defendant Rubenstein as "Tummy Flattener", is subjected to stress, and such stress creates great potential striking power in the device.

(2) Said "Lithe-Line" device is made of round, solid rubber and, when subjected to the aforesaid stress, can depart from the instep of the feet while doing the "Tummy Flattener" exercise.

(3) Such departure from the instep of the feet while doing the "Tummy Flattener" exercise results in the aforesaid striking power of the "Lithe-Line" being directed against the person of the user.

(4) No safety or protective device of any nature to prevent the "Lithe-Line" from striking the user doing the "Tummy Flattener" exercise is provided by the defendants nor is any warning of danger given.

22

BROOKHART & DORSEY

By Benjamin H. Dorsey
Attorneys for Plaintiff
1025 Connecticut Avenue

(Certificate of Service)

[Filed Sept. 16, 1955]

23 MOTION FOR SUMMARY JUDGMENT

Comes now the defendants by their attorneys and move the court to grant a judgment in their favor. In support of said motion they refer to the pleadings, deposition of the plaintiff, and points and authorities in support of this motion which they pray to be read as a part hereof.

GALIHER & STEWART

By Richard W. Galiher
820 Woodward Bldg.
Attorneys for Defendants

Irving G. McCann
Benjamin H. Dorsey, Esqs.,
Attorneys for Plaintiffs
1025 Conn. Ave., N.W.,
Washington, D. C.

Please take notice that the points to be submitted in support of this motion, and the authorities intended to be used, are attached hereto, The rules of the above-named court require that if you oppose the granting of the same, you shall within five days from the date of service of a copy thereof upon you, or such further time as the said Court may grant, or as the parties of this suit may agree upon, file in reply with the court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for the defendants named above.

GALIHER & STEWART

By Richard W. Galiher

24 [Filed Oct. 7, 1955]

ORDER

Upon consideration of the motion for summary judgment filed by the defendants in this case, it is by the court this 7th day of October, 1955,

ORDERED, that the same be and is hereby granted, and this cause be and is hereby ~~finally~~ dismissed

ALEXANDER HOLTZOFF
JUDGE

Copy mailed this 5th day of October, 1955, to Benjamin H. Dorsey, Esq., 1025 Conn. Ave., N. W., Washington, D. C., Attorney for the plaintiffs.

GALIHER & STEWART
By Richard W. Galiher

25 Copy of the foregoing Motion and Points and Authorities mailed this 16th day of September, 1955, to Irving McCann, Benjamin H. Dorsey, Esqs., Attorneys for the Plaintiffs * * *.

GALIHER & STEWART
By Richard W. Galiher

[Filed Nov. 3, 1955]

26 NOTICE OF APPEAL

Notice is hereby given this 3rd day of November, 1955, that MARGUERITE JAMIESON AND CECIL B. JAMIESON hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of October, 1955 in favor of WOODWARD & LOTHROP AND HELENA RUBENSTEIN, INC., DEFENDANTS against said MARGUERITE JAMIESON AND CECIL B. JAMIESON, Plaintiffs

Mail copy to:
Richard W. Galiher, Esq.
* * * *

Benjamin H. Dorsey
Attorney for Plaintiffs

[Filed Nov. 15, 1955]

TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT

for the District of Columbia

Marguerite Jamieson et al.)
)
v.) Civil Action No. 2268-55
)
Woodward & Lothrop et al.)

Wednesday, October 5, 1955

Before Judge ALEXANDER HOLTZOFF. On defendants' motion for summary judgment.

* * * * * *

2 THE DEPUTY CLERK: No. 6, Jamieson and others versus Woodward & Lothrop and others.

THE COURT: Mr. Galiher.

MR. GALIHER: Your Honor, I have filed a motion for summary judgment in this case on behalf of the defendants Woodward & Lothrop's and Helena Rubinstein, because I feel that the record clearly demonstrates that there is no issue now remaining in the case which would warrant this case's proceeding.

This suit is instituted against these two defendants on the theory that, one, Helena Rubinstein manufactured a device known as a "Lithe-Line" or "Tummy Flattener," and that Woodward & Lothrop's sold it. I have the device right here, Your Honor. This is it. Plaintiffs' counsel has been kind enough to turn it over to me.

The theory is that this device was manufactured in a negligent manner and is inherently dangerous. The suit against Woodward & Lothrop's is also based upon breach of an alleged warranty. Let us take a look at the female plaintiff's deposition and see what the circumstances were.

THE COURT: Just what is the nature of the action?

MR. GALIHER: The theory is based in negligence and breach of warranty.

THE COURT: Yes; but what is the injury that is claimed?

MR. GALIHER: The lady, according to her deposition, put these two prongs between her hands, got down on the floor and put her feet through them, and was going through an exercise which was supposed to reduce her stomach, at the time this slipped off and struck her in the eye.

THE COURT: This is like an oldfashioned jumping rope that little girls used to use, is it not?

MR. GALIHER: Well, it is a little smaller than that, Your Honor, but it is on the same order.

That is in the deposition. She says she doesn't know what happened, except that this struck her in the eye; and she looked at this device after it happened, and there was nothing wrong with it. I have it here, Your Honor, and you can see there is nothing wrong with it.

THE COURT: Let me ask you this. What negligence is alleged or claimed?

MR. GALIHER: The only negligence that I can see is that this is an inherently dangerous object. According to the complaint, that is the only allegation.

THE COURT: Very well. You may proceed.

MR. GALIHER: According to this lady, the circumstances concerning the purchase of it are these: She saw it first -- and this is from her deposition, Your Honor, commencing on page 5 -- she saw it first in a magazine in a beauty shop, and later she happened to be over at a girl friend's. She was exercising every day and told her she still could not reduce her stomach, and she said to the girl friend, "Have you heard about those 'Lithe-Lines'?"

"And she said, 'Well, I bought one,' and she showed it to me. And that was the first time that I actually saw one."

Then when she gets down to the purchase, that commences on page 6. She asked her friend where it had been purc. ased. She said Woodward & Lothrop's. So this lady then went to Woodward & Lothrop's, at the Helena Rubinstein counter -- commencing at the top of page 7. She asked for the device by brand name -- she had it written down -- and asked if there were instructions to go with it. And "she said there were

enclosed in the container." It was never taken out of the container at the store, and then she took it home.

The testimony concerning the accident itself, Your Honor, and the circumstances, are set out in my motion. The testimony concerning the incident is, getting down to the crux of what occurred:

"Question" --

THE COURT: On what page, Mr. Galiher?

MR. GALIHER: Beginning on page 10, Your Honor.

"Question: And then you have indicated that you next held the device in your hands with your arms extended and you bent from side to side?

"Answer: That's correct.

"Question: And then what did you do after that?

"Answer: After that I got down on the floor -- well, wait just a minute -- I put my hands through the handles and put the body part of the hose across the bottom of my feet and then raised my feet up this way, up over my head.

"Question: I am not sure I follow you. You put the one end of this one handle on your foot; is that right?

"Answer: No. Both of the handles were in my hands and the body part of the hose, the center of it, was across my feet and then I raised my feet up over my head. In other words, I was lying down flat.

"Question: On your back?

"Answer: That's right, and then the exercise was also to bring them back down but that was the last that I remember. You see, I never got them down again.

"Question: And what happened that you never got your feet down?

"Answer: I don't know what happened. All I know is that I was unconscious and couldn't see anything. I mean, I came to consciousness and I couldn't see anything and I was lying on the floor.

"Question: Do you know for how long you had been unconscious? Answer: No, I do not.

"Question: What happened to the device? Answer: You mean at that time?

"Question: Yes. Answer: Really, I don't know.

"Question: Don't you know what happened to you? Answer: What happened to me?

"Question: Yes. Answer: Well, all I know is that my head was exploding with pain when I came to. I was shocked and I didn't even reach for the device or anything. I could never tell you what happened to that.

"Question: Did it break? Answer: Well, no, it was all right afterwards.

"Question: Well, then, do you know what happened to you at all? How did you happen to be knocked unconscious? Answer: I can't tell you. As I told you, I had a handle in either hand and my feet were across this rubber hose and I brought them up like this (indicating), my feet."

And then she goes on. I will not continue to read this testimony. But it is along the same line. She does not know exactly what happened to her.

And then -- at the bottom of page 3 of my memorandum -- again we say to her:

"Question: Where was the device? Answer: I don't know where it was at the time.

"Question: Did you, or anyone that you know of, afterwards examine this device? Answer: Well, you mean at the time? Anyone like my husband; is that what you mean?

"Question: Yes, or you or anyone. Answer: I never touched it again.

"Question: Did you ever see it again? Answer: I saw it again, yes. My husband carried it in his briefcase with the instructions."

And then she indicates finally when she was asked, "How did it appear to you?

"Answer: It looked just the same to me, as much as I could remember, because I couldn't see very much."

There is the history and the lady's own story of what happened to her, Your Honor. She doesn't know exactly what happened. I think it is obvious that what happened is she let this thing slip off of her feet. I think all of us know that any elastic gadget like this is, any rubber band, when it is subjected to tension and released, is going to snap back. Obviously that is what happened here.

8 As I say, here is the instrument that is supposed to have caused her injury, Your Honor. There is obviously nothing at all wrong with it. I am sure counsel will not contend that there is anything wrong with this. It is obvious by looking at it that there is nothing wrong with it. Nothing broke here. We simply have here an unfortunate accident that occured as a result of this lady's own carelessness.

THE COURT: Is this an elastic rope?

MR. GALIHER: Yes, sir; it is an elastic rope. So under the circumstances I respectfully submit that the record in this case clearly establishes that there is no basis of action either against Woodward & Lothrop's or Helena Rubinstein. Thank you.

THE COURT: Mr. Dorsey.

MR. DORSEY: Your Honor, this elastic, rubber rope has quite a bit of tensile strength. It is advertised and sold by Helena Rubinstein with the language, "With this ingenious little elastic rope"--

THE COURT: Just a minute. Is that in the record?

MR. DORSEY: It is Defendants' Exhibit No. 1, for identification, with the deposition.

THE COURT: I see.

MR. DORSEY: "-- it is possible for anybody" -- and "anybody" is

9 underscored. Then the exercise that was attempted, as Mr. Galiher concedes, was done in accordance with these instructions, as illustrated here in this silhouette figure.

(The instructions were handed up.)

THE COURT: You may proceed.

MR. DORSEY: Mrs. Jamieson bought this device for the purpose for which it was advertised and sold. There was no warning, no indication of any type, that you could get hurt with this thing.

THE COURT: What negligence do you claim?

MR. DORSEY: The negligence would be against the defendant Helena Rubinstein in failing to provide any sort of safety device of any nature, even minor corrugations, where you put this thing across the soles of your feet, or a clamp to hold it to your feet, and in failing to warn of the danger.

THE COURT: You have not filed any papers in opposition. There are no affidavits. The case is before the Court on the plaintiff's own deposition. She says she does not know what happened.

MR. DORSEY; She says approximately this, that she followed the instructions; she lay on the floor, and she put the rope in her insteps, and she raised the rope in accordance with the instructions.

THE COURT: Mr. Dorsey, you can take an ordinary rubber band and stretch it, and if you are careless with it it might snap; and ordinarily it would not hurt anybody, but it might hurt somebody.

MR. DORSEY: That is true, sir.

THE COURT: It might hit you. I would not suppose you would have a cause of action against the manufacturer of the rubber band or the perso who sold it to you.

MR. DORSEY: No, I would not suppose so either. But the manufacturer didn't advertise and sell that for a particular purpose, or provide particular instructions for its use, which if you follow and then are injured does give rise to a cause of action.

What the defendants in this case are attempting to do is to prevent any of the questions of adequacy of warning, particularly in view of the strength developed in this article when you use it in accordance with the instructions, from ever being presented.

There is a somewhat similar case in New York, in which a toy pistol, which emanated smoke, caught fire to a Santa Claus beard at Christmas; and there was an attempt at summary judgment in that case. That is Furst versus Art Metal Works.

THE COURT: You are not referring to those cases involving an inflammable fabric, are you?

MR. DORSEY: This is not an inflammable fabric case. It was a
11 gun here, which was advertised as harmless. A fabric caught fire; but it was not the fabric that was sold, but the gun that was sold. And the court there said:

"Where a manufacturer markets an article with such a sweeping and unqualified representation that a child could not be hurt by it" --

THE COURT: You are reading too fast. Will you state the facts again in that case.

MR. DORSEY: I am sorry, sir. There was a toy pistol which, when you pressed the trigger, emanated smoke and some sort of color; and it was advertised as perfectly harmless. It was taken home, around Christmas time, and the child went "Bang, bang," and his father's Santa Claus beard caught fire.

They went in and they originally received whatever the equivalent of a summary judgment is in New York; and it was reversed, on the theory that they had a right to prove whether the gun was, in accordance with the advertisement and representation, safe and harmless, whether there was an adequacy of warning or failure to warn -- which is what we would like to prove here.

THE COURT: But you did not file any opposing affidavits or any other opposing papers in this case. The only thing of record is the plaintiff's own deposition.

MR. DORSEY: I think the facts, even as set forth in the defendants'
12 motion, illustrate at least four questions of fact which cannot be decided here.

THE COURT: What are the questions of fact?

MR. DORSEY: The first is, was such an injury reasonably foreseeable by the manufacturer and vendor? And two, should some safety device have been provided on this elastic rope?

THE COURT: But you have not introduced any affidavit showing it would be reasonable to provide a safety device. The Court cannot speculate.

MR. DORSEY: That is a fact to be developed at the trial, Your Honor.

THE COURT: Oh no. You have to make a showing on the motion for summary judgment.

MR. DORSEY: The third is, in view of the strength of this device, was the defendant under a duty to warn the plaintiff of the danger, rather than entice --

THE COURT: What danger? That a rubber band might snap? It seems to me that is an obvious thing, to anybody.

MR. DORSEY: This develops more strength than you may imagine, sir. The injury was a very severe injury, a detached retina in one eye.

THE COURT: I sympathize with the plaintiff. Apparently the article snapped back and struck her eye, which is always a very serious matter.

13 MR. DORSEY: We are asking for the right to prove, as well as plead, that the defendants here enticed this purchaser, as well as any other similarly situated, to buy the thing on the ground that anybody could use it; that when you used it in accordance with the instructions the defendants provided, an accident like this could happen; and whether or not they carried forward with their duty to warn and guard against such an accident happening.

THE COURT: It is clear from the record of this motion that there is no basis for any contention that either of the defendants was negligent in any way or did anything or failed to do anything that was the proximate cause of the accident. Moreover, the plaintiff herself states she does

not know what happened. It is not often that defendants are entitled to summary judgment in a negligence case; but this is one of those cases. Defendants' motion for summary judgment is granted.

MR. GALIHER: May I present the order tomorrow morning?

THE COURT. Yes.

MR. GALIHER: Thank you.

REPORTER'S CERTIFICATE

* * * * * *